

Endangered Species Act Section 7 Consultation Guidance for HUD in Alaska

Prepared in collaboration with NOAA Fisheries

Applies in State of Alaska only

24 CFR Part 58/50

July 2021

General requirements	ESA Legislation	HUD Regulations
Section 7 of the Endangered Species Act mandates that actions authorized, funded, or carried out by Federal agencies must not jeopardize the continued existence of ESA-listed threatened or endangered species or result in the adverse modification or destruction of designated critical habitat.	The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.; particularly section 7)	24 CFR 58.5(e) 24 CFR 50.4(e)

Purpose: This document is intended to assist HUD and Responsible Entities (RE) in complying with the requirements of Section 7 of the Endangered Species Act (ESA) for the species listed as threatened and endangered under the ESA that are managed by NOAA Fisheries.¹

Under Section 7 of the ESA, federal agencies must consult with NOAA Fisheries when any action the agency carries out, funds, or authorizes may affect either a species listed as threatened or endangered under the ESA, or any critical habitat designated for it. The agency taking the action (in this case, HUD) is called the “action agency.”

Step 1: The action agency determines if any listed species or critical habitats in Table 1 are present in the action area (the area within which the project has any effects on listed species; not limited to the project area). NOAA Fisheries has an [online mapping tool](#) to help determine which species may be present in the action area.

Table 1. List of threatened and endangered species and critical habitats under NOAA Fisheries’ jurisdiction in Alaska.

Common Name	Scientific Name	Status	Critical Habitat in AK?
Bowhead Whale	<i>Balaena mysticetus</i>	Endangered	No
Sei Whale	<i>Balaenoptera borealis</i>	Endangered	No
Blue Whale	<i>Balaenoptera musculus</i>	Endangered	No
Fin Whale	<i>Balaenoptera physalus</i>	Endangered	No
Cook Inlet DPS Beluga Whale	<i>Delphinapterus leucas</i>	Endangered	Yes
Western North Pacific DPS Gray Whale	<i>Eschrichtius robustus</i>	Endangered	No
North Pacific Right Whale	<i>Eubalaena japonica</i>	Endangered	Yes
Mexico DPS Humpback Whale	<i>Megaptera novaeangliae</i>	Threatened	Yes
Western North Pacific DPS Humpback Whale	<i>Megaptera novaeangliae</i>	Endangered	Yes
Sperm Whale	<i>Physeter macrocephalus</i>	Endangered	No
Arctic Ringed Seal	<i>Phoca hispida hispida</i>	Threatened	Proposed

¹ This document only pertains to marine species and critical habitats under the jurisdiction of NOAA Fisheries. HUD may also be required to consult with the U.S. Fish and Wildlife Service for ESA-listed species under their jurisdiction. Refer to the [USFWS Programmatic Section 7 Consultation for Housing and Urban Development community upgrades in Alaska](#) for more information.

Beringia DPS, Bearded Seal	<i>Erignathus barbatus nauticus</i>	Threatened	Proposed
Western DPS Steller Sea Lion	<i>Eumetopias jubatus</i>	Endangered	Yes

Step 2: If ESA-listed species may be present in the action area, the action agency must then determine whether its actions (or authorizations) may affect those ESA-listed species. This is called the action agency’s “effect determination.”

The action agency may make three different effect determinations, with different Section 7 consultation requirements for each (Figure 1).

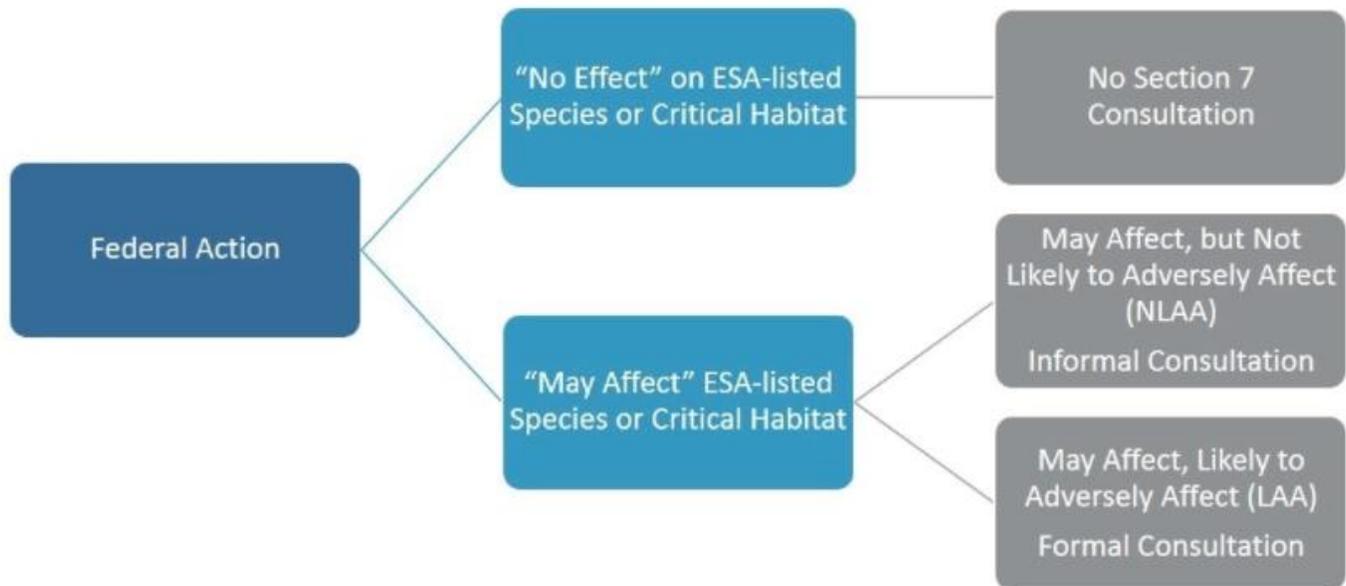


Figure 1. Effects determinations and type of ESA Section 7 consultation required by each.

No Effect means the proposed action will have no effect whatsoever on listed species or critical habitat. If the action agency makes a no effect determination, a Section 7 consultation is not required. The action agency is not required to consult with NOAA Fisheries on the project and NOAA Fisheries will not concur with the determination. Following are some examples of when a no effect determination is appropriate:

- No listed species or critical habitat occur anywhere, or at any time, in the action area (i.e., not just within the immediate project footprint but also outside the immediate area involved in the action and anywhere within the range of project effects).
- The listed species occur in the action area seasonally, but the action will be timed to avoid the presence of listed species and there will be no effect to those species or their critical habitat once they return to the area (e.g., an activity will not have an effect on the food source or reproductive habitat of a species so that species may use the areas when they return to the area).
- The listed species (or critical habitat) occur in the action area and may be present at the time of the project, but there are no plausible routes of effects.

If a project “**may affect**” ESA-listed species or critical habitat, the action agency must request a Section 7 consultation with NOAA Fisheries. The predicted extent of those effects determines whether a formal or informal consultation is required.

A “**may affect but is not likely to adversely affect**” determination means the proposed action may affect ESA-listed species or critical habitats but all effects will either be insignificant, extremely unlikely to occur, or beneficial. No “take” of listed species is expected. An **informal consultation** with NOAA Fisheries is required. Once consultation is initiated, this process takes 30-60 days to complete.

If a project “**may affect and is likely to adversely affect**” ESA-listed species or critical habitats, effects of the proposed action may impact the listed species (including behavioral changes) or critical habitat and a **formal consultation** with NOAA Fisheries is required. Once consultation is formally initiated, this process takes 135 days to complete.

The following questions will help you make the appropriate determination for a proposed project. If you answer “No” to all of the following questions, it is likely that your project will have No Effect to ESA-listed species or critical habitats. However, it is up to HUD/RE to evaluate all potential effects of each proposed action, not just those listed in the examples below.

1. **Are there listed species or critical habitats in the action area?** (If unsure, check the [NOAA Fisheries Endangered Species and Critical Habitat Mapper](#) or call NOAA Fisheries for technical assistance.)

Yes: Project *may affect* listed species or critical habitats. Further information is needed to determine if a *no effect* determination is warranted.

No: Proceed to next question.

2. **Will listed species be present in the action area while the project activity is taking place?**

Yes: Project *may affect* listed species. Further information is needed to determine if a *no effect* determination is warranted.

No: Proceed to next question.

3. **Will the proposed action damage or destroy critical habitat, even if the species is not present?**

Yes: Project *may affect* critical habitat, therefore consultation is required.

No: Proceed to next question.

4. **Will the proposed action require extra barge or vessel traffic to deliver supplies, materials, or equipment for the project beyond what is regularly scheduled?**

Yes: The extra vessel traffic required to deliver project materials *may affect* listed species through underwater noise, entanglement, or ship strike; therefore, consultation is required.

No: Proceed to next question.

5. Will any part of the proposed project take place below Mean Higher High Water (MHHW)?

Yes: Some project work may occur in water or in areas that are underwater at certain high tides and therefore *may affect* listed species and consultation is required.

No: Proceed to next question.

6. Do you expect contaminants, trash, or debris* from the project action to reach salt water?

Yes: Some contaminants/trash/debris may enter salt water where they *may affect* listed species through contamination, ingestion, entanglement, or other effects; therefore, consultation is required.

No: Proceed to next question.

*Consult link to learn more.

7. Will the project action be within 3,000 feet where seals or sea lions are (or will be) hauled out (including those on ice)?

Yes: A discussion with NMFS is required. *NOTE*: Discussion will be around the sound the project will make and possible impacts on the species.

No: There are no seals or sea lions within 3,000 feet of the project site.

Step 3: Requesting a Section 7 Consultations from NOAA Fisheries Alaska Region

Guidance, information, and examples for preparing ESA Section 7 consultation requests are available at the [NOAA Fisheries Alaska Region website](#). A consultation request is typically referred to as a biological evaluation (BE) or a biological assessment (BA). HUD staff or RE staff may obtain assistance from an environmental consultant to gather the information or conduct the analyses needed to prepare a BE/BA or request a Section 7 consultation.

I. Informal Consultation Process in Alaska

During informal consultation, HUD submits a BE/BA, NOAA Fisheries then reviews the BE/BA and either concurs or does not concur with HUD's effect determination. Sometimes modifications to the project are required to reach concurrence that the project "*may affect but is not likely to adversely affect*" ESA-listed species and critical habitats. Once NOAA Fisheries concurs, they will provide a Letter of Concurrence to HUD. If NOAA Fisheries does not concur, they may: 1) recommend further changes to the proposed action to avoid or mitigate adverse effects; or 2) recommend formal consultation and the authorization of take.

II. Formal Consultation Process in Alaska

The Section 7 consultation guidance provided here to HUD and its REs presumes that HUD's proposed actions will not result in jeopardy to listed species and will not destroy or adversely modify critical habitat. During formal consultation, NOAA Fisheries reviews the BE/BA and prepares a Biological Opinion with an associated Incidental Take Statement that authorizes take of listed species. Incidental Take Statements typically contain associated non-discretionary Reasonable and Prudent Measures that must be implemented by the action agency in order to avoid or minimize take.

Key Definitions:

Action agency means the federal agency that carries out, funds, or authorizes an action that may affect either a species listed as threatened or endangered under the ESA, or any critical habitat designated for it. HUD or the RE's would be the action agency.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Beneficial effects are effects of an action that are positive for ESA-listed species with no associated negative effects.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

Discountable effects means any effects of the action with respect to their impact to ESA-listed species are extremely unlikely to occur.

Insignificant effects means the effects of the action with respect to their impact to ESA-listed species are so small they cannot be meaningfully measured, detected, or evaluated.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct

For further information, technical assistance, or to submit a consultation request:

HUD Technical Assistance:

Brian Sturdivant
Regional Environmental Officer
Region X
Brian.Sturdivant@hud.gov

NOAA Fisheries Technical Assistance:

Greg Balogh
Alaska Region Section 7 Coordinator
Telephone: 907-271-1937
Greg.Balogh@noaa.gov

To Request a Section 7 Consultation:

Jon Kurland
Assistant Regional Administrator for Protected Resources
Telephone: 907-586-7638
Jon.Kurland@noaa.gov

DISCLAIMER: This document is intended as a tool to help REs and HUD staff complete ESA requirements. This document is subject to change. This is not a policy statement, and the Endangered Species Act and associated regulations take precedence over any information found in this document.